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No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. MCCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE "*MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966).)

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 9

ARGUMENT 12

CONCLUSION 26

CERTIFICATE OF SERVICE 27

APPENDIX

OHIO REVISED CODE (PAGES)

SECTION 4511.19 28

SECTION 4511.191 30

AUTHORITIES

Page

Adams v. *Williams*, 407 U.S. 143 (1972) 13
Allen v. *United States*, 390 F. 2d 476 (D.C. Cir., 1968) 16
Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 20
Borodine v. *Douzanis*, 592 F. 2d 1202 (1st Cir., 1979) 16
Brewer v. *Williams*, 430 U.S. 387 (1977) 21
California v. *Beheler*, ___ U.S. ___ (1983), 103 S. Ct. 3517 13
Chapman v. *California*, 386 U.S. 18 (1967) 8, 25
Clay v. *Riddle*, 541 F. 2d 456 (4th Cir., 1976) 8, 17, 21
Counselman v. *Hitchcock*, 142 U.S. 547 (1892) 22
Delaware v. *Prouse*, 440 U.S. 648 (1979) 13
Doyle v. *Ohio*, 426 U.S. 610 (1976) 22
Dunaway v. *New York*, 442 U.S. 200 (1979) 18
Escobedo v. *Illinois*, 378 U.S. 478 (1964) 15, 21
Estelle v. *Smith*, 451 U.S. 454 (1981) 22
Fare v. *Michael C.*, 442 U.S. 707 (1979) 22, 24
Harrington v. *California*, 395 U.S. 250 (1969) 25
Harryman v. *Estelle*, 616 F. 2d 870 (5th Cir., 1980) 24
Kirby v. *Illinois*, 406 U.S. 682 (1972) 21
Lowe v. *United States*, 407 F. 2d 1391 (9th Cir., 1969) 16

Mackey v. *Montrym*, 443 U.S. 1 (1979) 14
Mathis v. *United States*, 391 U.S. 1 (1968) 13
McCarty v. *Herdman*, 716 F. 2d 361 (6th Cir., 1983) 1
Michigan v. *Mosley*, 423 U.S. 96 (1975) 23
Michigan v. *Summers*, 452 U.S. 692 (1981) 18
Michigan v. *Tucker*, 417 U.S. 433 (1974) 21
Milton v. *Wainwright*, 407 U.S. 371 (1972) 25
Miranda v. *Arizona*, 384 U.S. 436 (1966) 7, 9, 12, 13, 15, 20, 22
North Carolina v. *Butler*, 441 U.S. 369 (1979) 21, 22
Oregon v. *Mathiason*, 429 U.S. 492 (1977) 13, 15, 22
Oregon v. *Roberti*, No. 82-315, petition filed August 20, 1982, 52 U.S.L.W. 3095 ..... 16, 17
Orozco v. *Texas*, 394 U.S. 324 (1969) 13
Pennsylvania v. *Mimms*, 434 U.S. 106 (1977) 13
Perez v. *Campbell*, 402 U.S. 637 (1971) 14
Rhode Island v. *Innis*, 446 U.S. 291 (1980) 19
Schmerber v. *California*, 384 U.S. 757 (1966) 19
South Dakota v. *Neville*, ___ U.S. ___ (1983), 103 S. Ct. 916 ..... 19, 21
State v. *Roberti*, 293 Or. 59, 644 P. 2d 1104, 293 Or. 236, 646 P. 2d 1341 (1982) 16

Steigler v. *Anderson*, 496 F. 2d 793 (3rd Cir., 1974) 16
Terry v. *Ohio*, 392 U.S. 1 (1968) 9, 13, 14
United States v. *Bridwell*, 583 F. 2d 1135 (10th Cir., 1978) 16
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 14
United States v. *Hall*, 421 F. 2d 540 (2nd Cir., 1969) 16
United States v. *Harris*, 528 F. 2d 914 (4th Cir., 1975) 16
United States v. Harris, 611 F. 2d 170 (6th Cir., 1979) 16
United States v. *Jimenez*, 602 F. 2d 139 (7th Cir., 1979) 16
United States v. *Jones*, 630 F. 2d 613 (8th Cir., 1980) 16
United States v. *Lueck*, 678 F. 2d 895 (11th Cir., 1982) 16
United States v. *Montos*, 421 F. 2d 215 (5th Cir., 1970) 16
United States v. *Place*, ___ U.S. ___ (1983), 77 L. Ed. 2d 110, 103 S. Ct. 2637 13

Constitution and statutes:

United States Constitution, Amendment V 3
United States Constitution, Amendment VI 3
Ohio Revised Code (Page's) Section 4511.02 ..... 3, 17
Ohio Revised Code (Page's) Section 4511.19 4
Ohio Revised Code (Page's) Section 4511.191 ..... 4, 21
Ohio Revised Code (Page's) Section 4511.99 5
Ohio Revised Code (Page's) Section 2929.21 5
28 U.S.C. Section 1254(1) 2
Federal Rules of Appellate Procedure, Rule 43 2

Miscellaneous

Crime in the United States: Uniform Crime Report, 1980. Washington, D.C.: U.S. Government Printing Office, September, 10, 1981 20

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BRIEF OF PETITIONER

OPINIONS BELOW

The decision of The United States Court of Appeals for the Sixth Circuit is now reported as *McCarty* v. *Herdman*, 716 F. 2d 361 (6th Cir., 1983) and is set out in the joint ap-

pendix at JA 7.[1] The decision of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is set out in the appendix to the petition at A-10.[2]

JURISDICTION

The panel decision of The United States Court of Appeals for the Sixth Circuit was entered on September 6, 1983. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

The petition for writ of certiorari was filed on October 27, 1983. Certiorari was granted by order of January 9, 1984.

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[1] References to the appendix to the petition for writ of certiorari are designated as "A", while references to the joint appendix are designated as "JA".

[2] Due to the death of Captain Herdman, respondent-appellee below, Harry J. Berkemer, petitioner herein, was substituted as a party pursuant to Rule 43(C), Federal Rules of Appellate Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Ohio Revised Code (Page's) Section 4511.02
Compliance with order of police officer (Eff. 10-19-78)

> (A) No person shall fail to comply with any lawful order or direction of any police officer in-

vested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop.

Ohio Revised Code (Page's) Section 4511.19
Driving While Intoxicated (Eff. 1-1-75)

No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse shall operate any vehicle, streetcar, or trackless trolley within this state.

(Full text set forth in Appendix, *infra.*, at page 28.)

Ohio Revised Code (Page's) Section 4511.191
Implied Consent (Eff. 10-25-78)

(A) Any person who operates a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways in this state while under the influence of alcohol.

(Full text set forth in Appendix, *infra.*, at page 30.)

Ohio Revised Code (Page's) Section 4511.99
Penalties (Eff. 3-15-79)

(A) Whoever violates Section 4511.19 of the Revised Code is guilty of a misdemeanor of the first degree, in addition to the license suspension or revocation provided in Section 4507.16 of the Revised Code. At least three days' imprisonment is mandatory under this division.

Ohio Revised Code (Page's) Section 2929.21
Penalties for Misdemeanor (Eff. 8-30-78)

(A) Whoever is convicted of or pleads guilty to a misdemeanor other than a minor misdemeanor shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the court as provided in this section.

(B) Terms for imprisonment for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than six months....

(C) Fines for midemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than one thousand dollars....

STATEMENT OF THE CASE

On March 31, 1980, Ohio State Highway Patrol Trooper C.J. Williams observed respondent McCarty's vehicle traveling southbound on Interstate Highway 270. McCarty's vehicle was weaving in and out of the expected lane of travel. Williams followed the car for some two miles then stopped the vehicle and asked McCarty to exit the car. Williams observed that McCarty needed support to keep from falling. (Stipulation of Fact, A-1.) Williams concluded that McCarty would be charged with a traffic offense and proceeded to have McCarty attempt to perform a field sobriety test.[1] Williams described McCarty as "falling" during this time. The parties stipulated that "While still at the scene of the arrest, Trooper Williams questioned the [respondent] concerning his use of intoxicants and the [respondent] replied that he had consumed two beers and had smoked several joints of marijuana a short time before." (Stipulation, A-2.) Williams then formally placed McCarty under arrest for the traffic offense of operating a motor vehicle while under the influence of alcohol or drugs. McCarty was transported to the Franklin County Jail where under the state's implied consent law, he was asked to take an intoxilyzer test. The test indicated that no alcohol was present in McCarty's blood system.

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[1] In view of the express stipulation of the parties, dictum of the court below to the effect "...that [respondent] was not in custody until he was formally placed under arrest." (JA 13), is clearly without factual foundation. The parties have always agreed that respondent was "in custody" under any rational interpretation of that term. As the parties so stipulated, no reasonable person would have felt at liberty to leave the scene. The question before this Court is whether such is the *type* of custody encompassed by the *Miranda* decision.

Thereafter, Williams began to fill out an alcohol influence report. That report (JA 2) was made a part of the stipulation of fact before the municipal court judge hearing McCarty's traffic case. Included, *inter alia*, in the report were the observations of McCarty's physical appearance and condition, the observed facts of the offense and arrest and whether McCarty had been injured, was ill or diabetic. In response to Trooper Williams' inquiry, McCarty reiterated his statement made earlier at the highway scene, that he had consumed two beers. McCarty added that the marijuana he had smoked did not contain any "angle (sic) dust" or "PCP". McCarty also responded that he guessed he was "barely" under the influence of alcohol. (Stipulation, A-2, 3.) At no time was McCarty advised of his "*Miranda* rights".

Prior to trial of the traffic offense, McCarty unsuccessfully moved to suppress all statements given to Trooper Williams urging that they were obtained in violation of the rules announced by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

On September 15, 1980, respondent McCarty was found guilty of the traffic offense of operating a motor vehicle while under the influence of alcohol or drugs. McCarty was sentenced to ninety days in jail. Eighty days were suspended. McCarty was ordered to spend four days in an alcohol and substance abuse program and six days in the county jail. McCarty was also fined three hundred dollars, one hundred of which was suspended. McCarty appealed unsuccessfully to the Court of Appeals for Franklin County, Ohio, and to the Supreme Court of Ohio, in each instance raising the issue of admissibility of his statements to the arresting officer. The Court of Appeals for Franklin County affirmed the conviction on March 10, 1981. Further review was denied by the Supreme Court of Ohio on July 1, 1981.

On September 11, 1981, McCarty filed a petition for a writ of habeas corpus in the United States District Court for

the Southern District of Ohio, Eastern Division, alleging deprivation of his constitutional rights by the admission of his statements to the arresting officer. On December 11, 1981, the district court denied the petition finding that the "*Miranda* warnings" do not have to be given prior to questioning a person arrested for a traffic offense. In doing so, the district court adopted the reasoning of the United States Court of Appeals for the Fourth Circuit in *Clay* v. *Riddle*, 541 F. 2d 456 (4th Cir., 1976). McCarty appealed from the decision and order of the district court to the United States Court of Appeals for the Sixth Circuit. On September 6, 1983, a divided panel of the circuit court reversed the judgment of the district court.

The majority rejected the analysis of *Clay* v. *Riddle*, *supra.*, and held that an impaired driver who is taken into custody must be given the *Miranda* warnings prior to questioning by a police officer. In dissent, Judge Wellford held that statements made *at the scene* of a highway safety arrest were outside the strictures of the *Miranda* decision and thereby admissible.[4] (JA 14) *Accord., Clay* v. *Riddle, supra.*

On January 9, 1984, this Court granted a writ of certiorari to resolve the question of whether law enforcement officers must give "*Miranda* warnings" to indiviuals arrested for highway safety offenses such as driving under the influence of intoxicants.

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[4] Judge Wellford went on to hold that statements later made by respondent at the police station should have been suppressed. However, he further noted that these subsequent declarations were simply a reiteration of the earlier statements and therefore clearly subject to the harmless error doctrine fashioned in *Chapman* v. *California*, 386 U.S. 18 (1967).

SUMMARY OF ARGUMENT

I. "*Miranda* warnings" (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)) are not required to be given to an individual stopped for a brief period of time for investigation of suspicious behavior. A brief stop (authorized by *Terry* v. *Ohio*, 392 U.S. 1 (1968)) whether to investigate a suspected felony or for enforcement of highway safety laws, does not equate the formal, custodial interrogation contemplated by the *Miranda* decision. As the usual purpose of a *Terry* stop is to gain further information, a requirement that the law enforcement officer preceed his inquiries with "*Miranda* warnings" would defeat the purpose of the interview. Such requirement would seriously hamper the traditional function of police officers investigating crime, a position disavowed in the *Miranda* decision. See *Miranda*, *supra.*, 384 U.S. at 477-478.

"*Miranda* warnings" should not be applied to the stopping of a motorist suspected of violating a highway safety law as none of the practices deemed coercive by the *Miranda* decision are present in a traffic safety stop. On-the-scene questioning of a motorist stopped upon reasonable suspicion of driving while intoxicated is not the form of custodial interrogation envisioned by the *Miranda* decision. To require warnings under such circumstances would seriously impair a state's ability to provide for safe highways.

None of the standard tests which have been employed by the courts to determine the issue of custody is workable in the context of highway safety law enforcement. Subjective intent hinges on the repudiated "focus" of investigation standard. The objective or reasonable man test is unworkable in highway safety enforcement as no reasonable person would feel free to ignore a traffic officer's visible and audible signal to stop a vehicle; nor would any individual feel at liberty to leave the scene when ordered by a police of-

ficer to exit a vehicle. The use of formal arrest as a standard is undesirable, predicating admissibility of the suspect's statements on the traffic officer's decision of when to utter formal words. Such test merely serves to escalate form over substance as police officers can thereby conduct interrogations by delaying the rote incantation of *Miranda* warnings.

The dissenting opinion of Judge Wellford, below, correctly asserts that admission or confessions of a suspected traffic law violator, made at the scene of the investigation of a traffic offense, should be admissible without prior *Miranda* warnings. Adoption of the rule in cases of traffic safety law enforcement would clarify an important area of law currently decided in varying ways in various jurisdictions. The rule would provide a categorical rather than *ad hoc* basis for determination of the issue and provide a clear guideline for the courts and a workable rule for law enforcement officials engaged in highway safety law enforcement.

II. A state may validly require a person who is suspected of operating a motor vehicle on state highways while intoxicated, to submit to a reasonable test of the person's blood-alcohol content. Neither the test, nor inquiries of the arrested suspect regarding the test are proscribed by the Fifth Amendment or the prophylactic requirements of the *Miranda* decision.

Brief inquiries of a person arrested and in custody for drunken driving are not in the nature of those techniques of custodial interrogation deemed to be coercive by the *Miranda* Court. As the perceived need for protections against coercive police practices thought to exist in *Miranda* are not present during brief custodial inquiries of arrestees charged with highway safety violations, the Court should not apply the rigid prophylactic rule of *Miranda* to routine highway safety arrests.

III. Should the Court deem it necessary and advisable to apply the rationale and result of the *Miranda* decision to questioning following formal arrest and ensuing conveyance to a facility wherein a test for intoxication can be held, the Court should reverse the judgment below by applying the doctrine of harmless error.

ARGUMENT

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE "*MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966).

I. The Traffic Stop

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court announced procedural safeguards to ensure that a person arrested and taken to a police stationhouse would be informed of his Fifth Amendment right to remain silent in the face of police investigative interrogations. In so ruling, the Court addressed what was perceived to be the inherently coercive nature of lengthy, incommunicado police station interrogations designed to elicit confessions or other admissions. The Court reasoned the advice of the right to remain silent was necessary to dispel that coercive atmosphere and enable the arrestee to make a free and rational choice whether or not to speak.

The arrestee's perception that interrogation would continue indefinitely was a significant factor to the *Miranda* Court. Amplifying its concern, the Court reasoned that the warning of the right to remain silent was necessary to overcome "...an interrogator's imprications, whether implied or expressly stated, that the interrogation would continue until a confession is obtained...." (384 U.S. at 468.) The *Miranda* decision further held that a knowing, intelligent and voluntary waiver of the presence of counsel was another protective device necessary to counter coercive police practices in incommunicado interrogation and thereby secure Fifth Amendment values.

Custodial interrogation, the key premise of the *Miranda* decision, was extended from the stationhouse to the prison in *Mathis* v. *United States*, 391 U.S. 1 (1968) and to non-institutional settings in *Orozco* v. *Texas*, 394 U.S. 324 (1969). However, the exception for on-the-scene investigatory questioning carved out in *Miranda* (384 U.S. at 477) has not been diminished by later decisions of this Court. Custody within the context of *Miranda* and its progeny, means formal arrest or restraint of freedom to the degree associated with formal arrest. *California* v. *Beheler*, ____U.S.____(1983), 103 S. Ct. 3517; *Oregon* v. *Mathiason*, 429 U.S. 492 (1977). Custody, for purposes of analysis under *Miranda*, cannot be equated to that type of custody which is inherent to highway safety arrests.

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. [Citation omitted.] .... General on-the-scene questioning of citizens in the fact finding process is not affected by our holding."
> *Miranda, supra.*, 384 U.S. at 477.

This position is consistent with those decisions wherein the Court has permitted law enforcement officers, acting on reasonable suspicion that a crime has been or is about to be committed, to forcibly stop and temporarily detain an individual for the purpose of pursuing a limited course of investigation to confirm or dispel the officer's suspicions. e.g. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143, 146 (1972). See *United States* v. *Place*, ____U.S. ____(1983), 77 L. Ed. 2d 110, 103 S. Ct. 2637; *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Of course, the stop must be based upon articulable reasons, not mere inarticulate hunch. Compare *Delaware* v. *Prouse*, 440 U.S. 648 (1979). To require that *Miranda* warnings be given before asking ques-

tions which accompany a lawful *Terry* stop would defeat the very purpose of that legitimate, minimal intrusion. Such analysis and ensuing result is equally compelling in settings involving highway safety arrests.

This Court has recognized that an investigative stop is examined in terms of "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." *United States* v. *Brignoni-Ponce*, 422 U.S. 873 at 881 (1975). Quoting from *Terry* v. *Ohio, supra.*, 392 U.S. at 29, the Court noted that "...the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *Ibid.*, 422 U.S. at 881. A state has a compelling interest in highway safety. *Mackey* v. *Montrym*, 443 U.S. 1 at 17-18 (1979). As has been observed, "The slaughter on the highways of this Nation exceeds the death toll of all our wars." *Perez* v. *Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring). Traffic control officers must be allowed to stop a suspected intoxicated driver and make inquiries reasonably related to that stop.[5]

Clearly, Trooper Williams had a proper basis to stop respondent's vehicle and to investigate Williams' reasonable suspicion that respondent was intoxicated. When respondent needed support to keep from falling when asked to step from his vehicle, Trooper Williams had even further reason and concommitant duty to restrict respondent's ability to leave the scene while investigating his physical condition.

The questioning of respondent while investigating respondent's ability to operate a motor vehicle on a public highway

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[5] The necessity for some questioning under these circumstances extends beyond enforcement of traffic laws. Not all erratic driving is the result of alcohol or drug intoxication. A diabetic motorist may be suffering from insulin shock; another may have incurred a stroke. Highway safety extends beyond merely issuing citations to drivers.

did not occur in the type of custody envisioned by the *Miranda* Court. *Miranda* warnings should not be required before a traffic safety officer can question a suspected drunken driver.

Although Trooper Williams had terminated respondent's ability to leave the scene before questioning respondent about his use of intoxicants, the restriction of a motorist's ability to leave the scene during a traffic stop should not be considered the equivalent of what the *Miranda* Court perceived to be the inherently coercive atmosphere of a stationhouse investigative interrogation. While any encounter with a police officer may have some minimally coercive effect upon a citizen, (see *Oregon* v. *Mathiason*, *supra.*, 429 U.S. at 495), the commonplace event of routine traffic stops on the nation's highways does not equate the detailed custodial interrogation process of a serious criminal case. Respondent's statements that he had consumed intoxicating beverages and smoked "several joints" of marijuana, admissions made to Trooper Williams at the scene of the highway safety violation investigation, were not the product of any custodial interrogation as that concept was envisioned by the *Miranda* Court.

In his cogent dissent, Judge Wellford held that an admission or confession made by an arrested motorist at the scene of the offense should be admissible without *Miranda* warnings. (Dissenting Opinion below, JA 14.) Such is the better reasoned view of custody in highway safety offenses. None of the three tests for custody, subjective intent, objective or reasonable man standard or formal words of arrest, provides a workable measure to examine the question of custody in highway safety law enforcement.

Subjective intent hinges on the now repudiated focus of investigation test. c.f. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). *Miranda* itself disavowed such test. 384 U.S. 444, n.

4. Although rejected by all of the federal circuit courts[6], at least some state courts continue to adhere to the focus test in the decision making process when custody is at issue. (See *State* v. *Roberti*, 293 Or. 59, 644 P. 2d 1104 (1982), *on rehearing*, 293 Or. 236, 646 P. 2d 1341, certiorari pending, *Oregon* v. *Roberti*, No. 82-315, petition filed August 20, 1982, 52 U.S.L.W. 3095.)[7]

The reasonable man test offers no more valid basis for determining custody in highway safety law enforcement and is more a legal fiction than the objective standard it purports to be. No reasonable person would feel that he was free

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[6] The several Federal Circuit Courts of Appeals uniformally reject the notion that subjective intent to arrest or "focus", automatically transforms a police-suspect encounter into custodial status for purposes of "*Miranda* warnings". The First, Fourth, Sixth, Ninth, Tenth and District of Columbia Circuits appear to reject subjective intent or "focus" as a consideration. See *Borodine* v. *Douzanis*, 592 F. 2d 1202, at 1206 (1st Cir., 1979); *United States* v. *Harris*, 528 F. 2d 914, 915 (4th Cir., 1975); *United States* v. *Harris*, 611 F. 2d 170, 173 (6th Cir., 1979); *Lowe* v. *United States*, 407 F. 2d 1391 (9th Cir., 1969); *United States* v. *Bridwell*, 583 F. 2d 1135, 1138 (10th Cir., 1978); *Allen* v. *United States*, 390 F. 2d 476, 478-479 (D.C. Cir., 1968). The Second, Third, Seventh and Eighth Circuits consider "focus" or subjective intent to arrest, a circumstance to be considered along with other factors. See *United States* v. *Hall*, 421 F. 2d 540 (2nd Cir., 1969); *Steigler* v. *Anderson*, 496 F. 2d 793, 799-800 (3rd Cir., 1974); *United States* v. *Jimenez*, 602 F. 2d 139, 145-146 (7th Cir., 1979); *United States* v. *Jones*, 630 F. 2d 613, 615 (8th Cir., 1980). The Fifth and Eleventh Circuits specify focus or subjective intent as one of four factors to consider. See *United States* v. *Montos*, 421 F. 2d 215, 223 (5th Cir., 1970); *United States* v. *Lueck*, 678 F. 2d 895, 900 (11th Cir., 1982). However, no circuit holds that subjective intent alone creates custody.

[7] A copy of this petition has been provided to respondent.

to ignore the visible and audible signal of a traffic safety enforcement officer, flashing lights and siren, and proceed at will. Typically, failure to heed such a signal and stop a motor vehicle may be considered an offense itself. (See Ohio Revised Code Section 4511.02, fleeing a traffic safety officer.) Moreover, it is nothing short of sophistic to state that a motorist ordered by a police officer to step out of his vehicle would reasonable or prudently believe that he was at liberty to ignore that command.

The third standard of judging custody, incantation of the words of arrest, elevates form over substance. Admissibility of respondent's statements to Williams at the scene of the investigation should not hinge on Williams' decision of when to utter formal words of arrest. Such test is disingenuous, as it merely encourages a law enforcement officer to delay articulating his earlier decision that an arrest will be affected while he continues to question the detained motorist. The timing of these formal words should not be issue determinative.

In dissent, Judge Wellford has reached a conclusion more analytically sound than any of the traditional tests for custody. None of the standard tests for custody is workable in the context of highway safety law enforcement. Admitting statements of a suspected traffic law offender made at the scene of that highway investigation without regard to *Miranda* warnings avoids decision making based upon tests which are unworkable in highway safety enforcement. The position of Judge Wellford below and that of the Fourth Circuit in *Clay* v. *Riddle, supra.*, provides a workable rule for law enforcement officials and courts alike in highway safety cases.

The rule would clarify an important area of law which currently is in disarray as construed by state courts. (The Court has had the benefit of the petition for writ of certiorari filed by the State of Oregon in *Oregon* v. *Roberti, supra.* Replica-

tion of the citations contained in that petition would serve no useful purpose here.) The rule would provide a categorical rather than case by case basis for determination of the issue of custody. c.f. *Dunaway* v. *New York*, 442 U.S. 200, 219-220 (1979) (White, J., concurring). See *Michigan* v. *Summers*, 452 U.S. 692, 705, n. 19 (1981). Rather than force an *ad hoc* examination of circumstances involved in the on scene investigation of a suspected highway safety violation, the rule would provide a clear guideline for determination of that troublesome issue.

Respondent's statements to Trooper Williams, made at the scene of the traffic law arrest, should be admissible without resort to unworkable tests for custody.

II. The Implied Consent Test and Alcohol Influence Report

In *Schmerber* v. *California*, 384 U.S. 757 (1966), this Court upheld the right of a police officer to obtain a compelled blood test against a claim that the compulsory extraction of a blood sample violated the privilege against self-incrimination embodied in the Fifth Amendment. The Court found the compelled blood sample to be real or physical evidence as distinguished from testimony or communication and thus not protected by the Fifth Amendment privilege. *Schmerber* recognized that, within due process limitations, a state may force a person suspected of driving while intoxicated to submit to a reasonable blood-alcohol test, despite the fact that the evidence was a product of compulsion.

Schmerber expressly reserved the question of whether the privilege embodied in the Fifth Amendment barred the use in a criminal trial of evidence of refusal to submit to the test. That question was answered in *South Dakota* v. *Neville*, ___ U.S. ___ (1983), 103 S. Ct. 916.

In *Neville*, this Court found that evidence of refusal to submit to a lawfully requested test involved no impermissible coercion on the part of the state. As the act of refusal in the face of a lawful request is not an act coerced by the police officer, the act is not protected by the privilege. *Ibid.*, ___ U.S. ___, 103 S. Ct. at 923. Neville's two refusals unquestionably were made after full custodial arrest; initially at the scene of the arrest and later at a police station. However, the Court declined to find that an inquiry of whether an arrestee would submit to a blood-alcohol test was interrogation within the meaning of *Miranda*. Instead, the court likened the police questioning of Neville regarding the test, to words or actions normally attendant to arrest and custody and thus, not protected by the privilege. *Id.*, ___ U.S. ___, 103 S. Ct. at 923, n. 15, citing *Rhode Island* v. *Innis*, 446 U.S. 291, at 301 (1980). Although the court grounded its

decision on the basis that the response to the question of the officer was not a coerced act, and the question not interrogation within the meaning of *Miranda*, we respectfully submit that an analysis of the underlying basis for the *Miranda* decision demonstrates that the type of routine questioning attendant to an arrest for drunken driving is not conducted in the same atmosphere or with the interrogation techniques perceived to be offensive in *Miranda*.

In the *Miranda* decision, after exploring what were felt to be commonplace interrogation techniques employed by police investigators (384 U.S. at 445-458), the majority found that "...such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda, supra.*, 384 U.S. at 457. In contrast, an arrest following a traffic stop, whether for drunken driving or upon a bench warrant for non-payment of outstanding parking violations, does not trigger the type of criminal investigation typical of a more serious offense. It takes no empirical study to recognize that no law enforcement agency has the resources to investigate commonplace traffic offenses to the degree utilized on more serious criminal matters. This Court has recognized the tremendous disparity between the number of felony cases, the number on non-traffic misdemeanor cases and the number of traffic cases handled by this nation's courts on an annual basis. See *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).[9] Rather than

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[9] In 1965, some 338,000 defendants were charged with felonies in state and federal courts. At the same time, some four to five million non-traffic misdemeanor cases were processed, while by extrapolation, the nation's courts handled between 40.8 and 50 million traffic offenses annually. *Argersinger* v. *Hamlin*, 407 U.S. 25 at 34, N. 4 (1972). In 1980, the estimated number of drunken driving arrests totaled 1,426,700 nationwide. *Crime in the United States: Uniform Crime Reports, 1980.* Washington, D.C.: U.S. Government Printing Office, September 10, 1981, p. 191.

employing a carefully constructed interrogation tool designed to overbear the will of the traffic arrestee, the typical traffic control officer must return to patrol duty as rapidly as possible. There is no compelling reason to conduct custodial interrogations of highway safety law violators as virtually all such infraction occur in the presence of the law enforcement officer. The police conduct herein was not designed to isolate respondent from the assistance of counsel. c.f. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Trooper Williams transported respondent to the Franklin County jail for a breath test of his blood-alcohol content under a strictly regulated state statute. (See Ohio Revised Code Section 4511.191; Appendix, *infra.*, p. 30.) The isolation of respondent was a necessary incident of that permissible testing procedure. c.f. *Brewer* v. *Williams*, 430 U.S. 387, 438-439 (1977) (Blackmun, J., dissenting). At the time Trooper Williams conducted the blood-alcohol test and prepared the alcohol influence report form, respondent had not been formally charged and thus was not entitled to assistance of counsel within contemplation of *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).

As did the United States Court of Appeals for the Fourth Circuit in *Clay* v. *Riddle*, 541 F. 2d 456 (1976), the panel decision of the Court of Appeals for the Sixth Circuit below recognized that traffic offenses are commonplace events. However, the panel decision concluded that despite this fact, it was necessary to extend the prophylactic rule of *Miranda* to routine arrests for highway safety law infractions. (Opinion below, JA 12) We respectfully submit that the panel decision employed an incorrect analysis in reaching that conclusion.

The procedural rules formulated by the *Miranda* decision are prophylactic, rather than constitutionally mandated. *Miranda* v. *Arizona*, *supra.*, 384 U.S. at 467; *Michigan* v. *Tucker*, 417 U.S. 433 at 444 (1974). See *South Dakota* v.

Neville, supra., ____ U.S. ____, 103 S. Ct. at 923, n. 15; *Fare* v. *Michael C.*, 442 U.S. 707, 729 (1979) (Marshall, J., dissenting); *North Carolina* v. *Butler*, 441 U.S. 369 at 374 (1979); *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976). The *Miranda* decision itself recognizes that the now famous warnings were procedural safeguards to be employed in the absence of other fully effective measures. *Miranda* v. *Arizona, supra.*, 384 U.S. at 444. See *Estelle* v. *Smith*, 451 U.S. 454 at 466-467 (1981). Thus, the "*Miranda* rule" was designed to combat what the court perceived to be a widespread pattern of police misconduct; incommunicado interrogation techniques designed to overbear the will of the arrestee and produce a confession.

The perceived need for the prophylactic rule announced in *Miranda* is not present in the commonplace world of highway safety law enforcement. A police station by itself is not inherently coercive. *Oregon* v. *Mathiason, supra.* No widespread pattern of police misconduct is presented by the typical traffic offense arrest. Moreover, no law enforcement agency has the resources, either in manpower or facilities, to conduct detailed investigations of traffic law violations. The underlying premise upon which the *Miranda* protections were based (the perceived need to combat improper police interrogation practices) is not present in highway safety law enforcement. As the reason for the rule is not present, extension of the procedural rule to traffic offenses is unwarranted. To extend the rule without need would elevate the rule to its own reason for existence. The panel decision below employed the wrong analysis in considering whether the "*Miranda* rule" should be applied to highway safety law infractions.

This Court has observed that the Fifth Amendment privilege is "...as broad as the mischief against which it seeks to guard." *Miranda, supra.*, 384 U.S. at 459-460, quoting from *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892). Ap-

plication of the *Miranda* rule need be no broader than the mischief against which it sought to guard.

Additionally, the traffic offense of drunken driving is a class of offense which by its very nature renders the *Miranda* test for admissibility of statements (advice or warnings and a knowing, intelligent and voluntary waiver) of questionable benefit in protecting traditional Fifth Amendment values. First, by its nature, drunken driving presupposes that the offender's state of intoxication or impairment of function is such that the individual cannot perform the relatively simple task of operating a motor vehicle. Under these circumstances, *Miranda* warnings are of questionable value in determining whether the individual is making a rational choice to speak or not. The rule-oriented, decision-making process of *Miranda* is of little utility in determining whether the statement was voluntary. Rather, the traditional "totality of circumstances" test of voluntariness is a more appropriate vehicle to review statements uttered by drunken drivers. In that context, warnings may be a circumstance to consider, but should not be a necessary predicate to that determination. While an individual may be so intoxicated that his utterances may be considered involuntary in the traditional sense, unless an indivual is incompetent, this Court has rejected any paternalistic rule which would protect a person from his own intelligent decisions in a criminal case. See *Michigan* v. *Mosley*, 423 U.S. 96, at 108-109 (1975) (White, J., concurring). Moreover, advising a suspected intoxicated motorist that he may remain silent and refuse to answer any questions at the same time he is asked whether he will submit to a blood-alcohol test, may well create more confusion on the part of the individual than clarity of understanding.*

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* We recognize that in the traditional scenario of custodial interrogation, the rigidity of the *Miranda* rule has the virtue of specificity

The intoxication of an individual arrested for drunken driving will always present the argument that any statement made, with or without *Miranda* warnings, was involuntary. Of necessity, trial courts will be forced to examine all of the circumstances to determine the issue. Thus, the virtue of *Miranda*'s simplicity from a court prospective is absent in the case of an intoxicated motorist. Compare *Harryman* v. *Estelle*, 616, F. 2d 870, 874 (5th Cir., 1980) (noting that *Miranda* "...has allowed courts to avoid the intractable factual determinations that the former totality of circumstances approach often entailed.")

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for the police as well as the courts, thought to outweigh the burdens that the *Miranda* decision has imposed on law enforcement agencies. *Fare* v. *Michael C.*, 442 U.S. 707 at 718, (1979). The foregoing discussion however, demonstrates that the prophylactic rule fashioned in *Miranda* simply does not provide its intended bright-line precept in the context of a driver whose judgment is impaired.

III. Application of the Rule of Harmless Error

If, contrary to petitioner's submission, the Court should find that brief questioning attendant to the giving of a chemical test to detect intoxicants creates the same coercive atmosphere of persistant custodial interrogation found offensive in *Miranda* and thus, extend that holding to highway safety offense arrests, admission of McCarty's statement contained in the alcohol influence report falls within the harmless error rule. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967).

As observed by the dissent below, McCarty's responses to Trooper Williams' questions were merely recitations of what respondent had already admitted at the scene of the traffic arrest. At that scene, after being observed weaving in and out of his expected lane of travel, respondent stated that he had consumed alcohol and had smoked several "joints" of marijuana. Respondent was unable to stand without assistance. His responses given when Trooper Williams was filling out the alcohol influence report form were merely repetitions of his earlier statements.

As recognized by Judge Wellford in dissent below, "failure to suppress what was essentially repetitious confession evidence, which should not have been admitted on the basis of failure to give *Miranda* warnings at the jail, was harmless error under the circumstances." (Opinion below, JA 14)

Therefore, assuming, *arguendo*, error, admission of respondent's repetitious statements made after submission to the intoxilyzer test was harmless beyond a reasonable doubt. *Chapman* v. *California*, *supra*. c.f. *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

CONCLUSION

The foregoing demonstrates that the custodial questioning inherent to highway safety arrests for impaired driving is not within the contemplation of the decision in *Miranda* v. *Arizona*. While respondent was in custody at the time of questioning, such was not the type of restraint envisioned by the *Miranda* Court as necessitating the prophylactic warnings fashioned therein. The balance struck by the *Miranda* Court to assure the constitutional integrity of statements made to detectives by incommunicado felony suspects is simply inapplicable to impaired motorists arrested by highway safety officers.

Wherefore, the judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Brief of Petitioner have been served upon respondent, Richard N. McCarty, by personal service of such copies to the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio 43215, by delivery to counsel for respondent, or to an employee thereof, this 23rd day of February, 1984.

I further certify that all parties required to be served have been served. The respondent's name is Richard N. McCarty, and his address is 529 Erickson, Columbus, Ohio 43213.

ALAN C. TRAVIS
Counsel of Record
for Petitioner

OHIO REVISED CODE (PAGE'S) SECTION 4511.19
Driving While Intoxicated or Drugged.
(Effective 1-1-75)

No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse, shall operate any vehicle, streetcar, or trackless trolley within this state.

In any criminal prosecution for a violation of this section, or ordinance of any municipality relating to driving a vehicle while under the influence of alcohol, the court may admit evidence on the concentration of alcohol in the defendant's blood at the time of the alleged violation as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance withdrawn within two hours of the time of such alleged violation. When a person submits to a blood test at the request of a police officer under section 4511.191 [4511.19.1]of the Revised Code, only a physician or a registered nurse shall withdraw blood for the purpose of determining the alcoholic content therein. This limitation does not apply to the taking of breath or urine specimens. Such bodily substance shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director of health pursuant to section 3701.143 [3701.14.3] of the Revised Code. Such evidence gives rise to the following:

(A) If there was at that time a concentration of less than ten hundredths of one percent by weight of alcohol, but more than five hundredths of one percent by weight of alcohol, in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(B) If there was at that time a concentration of ten hundredths of one percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of alcohol.

(C) If there was at the time a concentration of five hundredths of one percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of alcohol.

Upon the request of the person who was tested, the results of such test shall be made available to him, his attorney, or agent, immediately upon the completion of the test analysis.

The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a police officer, and shall be so advised. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a police officer.

OHIO REVISED CODE (PAGE'S) SECTION 4511.191
Implied Consent.
(Effective 10-25-78)

(A) Any person who operates a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways in this state while under the influence of alcohol. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(B) Any person who is dead, unconscious, or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn consent provided by division (A) of this section and the test or tests may be administered, subject to sections 313.12 to 313.16 of the Revised Code.

(C) Any person under arrest for the offense of driving a motor vehicle while under the influence of alcohol shall be advised at a police station of the consequences of his refusal to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section. The advice shall be in a written form prescribed by the registrar of motor vehicles and shall be read to such person. The form shall contain a statement that the form was shown to the person under arrest and read to him in the presence of the arresting officer and one other police officer or civilian police employee. The witnesses shall certify to this fact by signing the form.

(D) If a person under arrest for the offense of driving a motor vehicle while under the influence of alcohol refuses upon the request of a police officer to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section, after first having been advised of the consequences of his refusal as provided in division (C) of this section, no chemical test shall be given, but the registrar of motor vehicles, upon the receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol and that the person refused to submit to the test upon the request of the police officer and upon the receipt of the form as provided in division (C) of this section certifying that the arrested person was advised of the consequences of his refusal, shall suspend his license or permit to drive, or any nonresident operating privilege for a period of six months, subject to review as provided in this section; or if the person is a resident without a license or permit to operate a motor vehicle in this state, the registrar shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation. The suspension or denial shall continue for the entire six-month period subject to review as provided in this section and subject to termination as provided in division (I) of this section.

(E) Upon suspending the license or permit to drive or nonresident operating privilege of any person, as provided in division (D) of this section, the registrar shall immediately notify the person in writing, at his last known address, and inform him that he may petition for a hearing as provided in division (F) of this section. If a person whose license, permit to drive, or nonresident operating privilege has been suspended, petitions for a hearing or appeals any decision that is adverse to him, the suspension shall begin

at the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person.

(F) Any person whose license or permit to drive or nonresident operating privilege has been suspended under this section, may, within twenty days of the mailing of the notice provided above, file a petition in the municipal court or the county court, or in case the person is a minor in the juvenile court, in whose jurisdiction the person resides or in whose jurisdiction the arrest occurred if the person is not a resident of this state, agreeing to pay the cost of the proceedings and alleging error in the action taken by the registrar of motor vehicles under division (D) of this section or alleging one or more of the matters whithin the scope of the hearing as provided in this section, or both. Such petitioner shall notify the registrar of the filing of the petition and send him a copy. The scope of the hearing shall be limited to the issues of whether a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol, whether the person was placed under arrest, whether he refused to submit to the test upon request of the officer, whether he was advised of the consequences of his refusal, and whether his employment is of such a nature that his ability to continue in the employment would be seriously affected if the suspension otherwise required under this section is imposed.

(G)(1) The registrar shall furnish the court a copy of the registrar's affidavit as provided in division (C) of this section.

(2) In hearing the matter and determining whether the person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section, the court shall decide the issue upon the registrar's certified

affidavit and such additional relevant, competent, and material evidence as either the registrar or the person whose license is sought to be suspended submits.

(3) In the proceedings, the registrar shall be represented by the prosecuting attorney of the county in which the person resides if the petition is filed in the county court, except where the petitioner is a resident of a city or village within the jurisdiction of a county court in which case the city director of law or village solicitor shall represent the registrar. If the petition is filed in the municipal court, the registrar shall be represented as provided in section 1901.34 of the Revised Code.

(4) If the court finds from the evidence submitted that the person has failed to show error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, then the court shall assess the cost of the proceeding against such person and shall impose the suspension provided in division (D) of this section. If the court finds that the person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, the cost of the proceedings shall be paid out of the county treasury of the county in which the proceedings were held, and the suspension provided in division (D) of this section shall not be imposed.

(5) The court may, if it finds reasonable cause to believe that suspension would seriously affect the person's ability to continue in his employment, grant the person occupational driving privileges during the period of suspension.

(6) If a person whose license has been suspended under this section has not previously filed a petition alleging that

the suspension would seriously affect the person's ability to continue his employment, the person may, at any time during the period of suspension, file a petition in any court that has jurisdiction over the person under division (F) of this section alleging such fact. The court may, upon satisfactory proof that there is reasonable cause to believe that suspension would seriously affect the person's ability to continue in his employment, grant the person occupational driving privileges during the period for which the suspension would otherwise be imposed. The petitioner shall pay the costs of the proceeding and shall notify the registrar of the filing of the petition and send him a copy. The registrar shall be represented as provided in division (G)(3) of this section.

(7) In granting occupational driving privileges, the court may impose any condition it considers reasonable and necessary to limit the use of a motor vehicle by the person. The court shall deliver to the person a permit card, in a form to be prescribed by the court, setting forth the time, place, and other conditons limiting the defendant's use of a motor vehicle. The grant of occupational driving privileges shall be conditioned upon the person's having the permit in his possession at all times during which he is operating a motor vehicle.

A person granted occupational driving privileges who operates a motor vehicle for other than occupational purposes, in violation of any condition imposed by the court, or without having the permit in his possesion, is guilty of a violation of section 4507.38 of the Revised Code.

(8) The court shall give information in writing of any action taken under this section to the registrar of motor vehicles.

(H) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended,

the registrar shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

(I) A suspension of the license or permit to drive of a resident, the suspension of the operating privilege of a nonresident, or the denial of a license or permit for refusal to submit to a chemical test to determine the alcoholic content of the person's blood pursuant to this section, shall be terminated by the registrar upon receipt of notice of the person's entering a plea of guilty or of his conviction after entering a plea of no contest under Criminal Rule 11, to the offense of driving a motor vehicle while under the influence of alcohol, if the offense for which the plea is entered arose from the same incident that led to the suspension or denial.